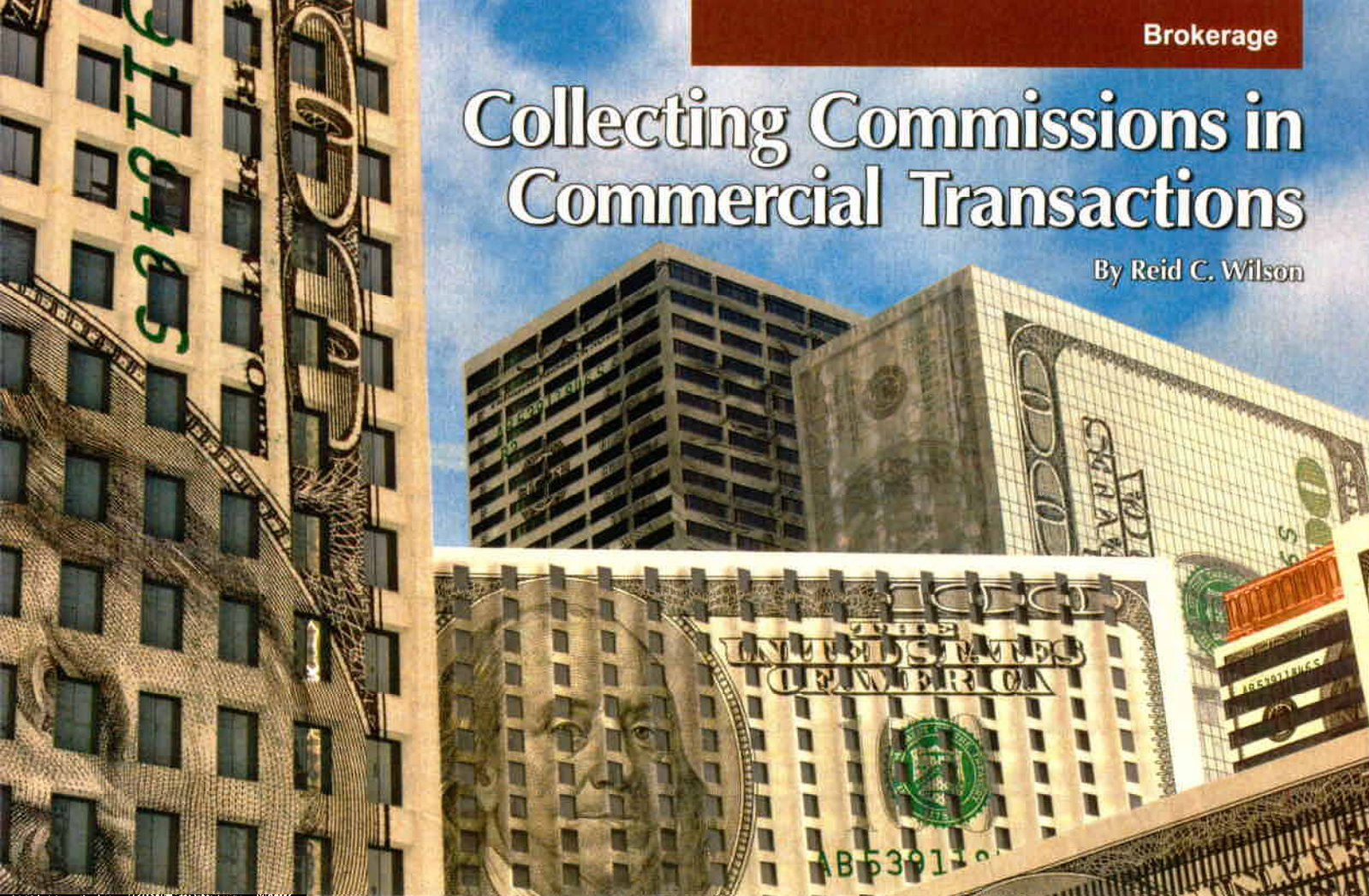


# Collecting Commissions in Commercial Transactions

By Reid C. Wilson



Most real estate transactions conclude with the broker being paid directly by a title company, in accordance with the Texas Real Estate Commission (TREC) form contract. But what if a dispute occurs concerning the commission due? What if the commission agreement is not clearly stated in the sales contract?

Texas courts have not often sided with brokers asserting rights to commissions. In many cases, brokers prove their own worst enemies by failing to follow relatively simple requirements.

## Strict TREL A Compliance Required

Texas courts strictly enforce the requirements of the Texas Real Estate License Act (TREL A) in commission disputes. TREL A requires that a commission agreement:

- be signed by the person paying the commission;
- contain a promise that a specified commission will be paid or refer to a written commission schedule to calculate the commission;
- identify the broker; and
- identify the real property.

These rules apply to all real estate transactions.

Four Texas Supreme Court cases addressed disputes centered on commercial commission agreements. In all four cases, the brokers were denied commissions for failing to meet these rules.

To collect unpaid commissions, brokers must claim breach of contract under TREL A. Commercial brokers may also claim and foreclose a lien under the Brokers and Appraisers Lien on

Commercial Real Estate Act. A valid contract under TREL A is a prerequisite to the lien.

## No Exceptions to Written Agreement

The Texas Supreme Court holds that a real estate contract that does not meet TREL A requirements may not be the basis for a broker to collect a commission, even if the broker set in motion the events culminating in a sale.



In *Trammell Crow v. Harkinson*, broker Harkinson had a written exclusive representation agreement with a tenant to locate rental space. The agreement expressly stated that Harkinson's commission would be paid solely by the landlord or property owner.

Harkinson found suitable space owned by Trammell Crow and began negotiating a lease. Trammell Crow representatives told Harkinson verbally that the company would pay a 42 percent cash commission. The broker was sent an unsigned commission agreement to that effect.

Harkinson redrafted the agreement, retaining the 42 percent commission term but changing other terms. He signed the agreement and returned it. Trammell Crow representatives never signed it, nor did they send any other written commission agreement to Harkinson.

Harkinson continued negotiating the lease with Trammell Crow, but his tenant, without his knowledge, made an agreement with Trammell Crow that Trammell Crow would pay Harkinson only \$30,000 in commission. This was significantly less than the \$346,500 that would have been due at the 42



percent rate. Harkinson refused the \$30,000 and sued both landlord and tenant for loss of commission, fraud, breach of contract, breach of duty of good faith and fair dealing, interference with contract and prospective business relations and civil conspiracy.

Ultimately, Harkinson lost his case because he did not have an enforceable written commission agreement. The trial court granted summary judgment for the defendants, and Harkinson appealed. The court of appeals reversed the ruling on the interference and civil conspiracy claims only and awarded Harkinson damages. However, the Supreme Court ruled that a real estate broker cannot recover lost commissions without a valid commission agreement.

The court distinguishes oral agreements for the sale of real estate, in which the statute of frauds may sometimes be avoided, from oral agreements for brokerage commissions. While the former may be enforceable in certain circumstances, the court holds that there are no circumstances in which a broker may enforce a commission agreement, except under TREL A.

### Clear Agreement Precludes 'Unfair' Claim



In *Friendswood Development Company v. McDade + Company*, a relocating tenant contacted Friendswood about leasing office space. Friendswood had no space available but offered to lease sublet space it did not own to the tenant for an interim period.

While considering this proposal, the tenant retained McDade + Company by an exclusive brokerage contract, with an exception for Friendswood, allowing the tenant to deal with either McDade or Friendswood. McDade expended substantial effort looking for acceptable space. The tenant then accepted the Friendswood proposal.

When McDade learned that Friendswood had leased space that it did not own to the tenant, McDade sued the tenant for breach of the commission agreement and sued Friendswood for interference with the commission agreement. The court of appeals found that there were ambiguities in the contract that entitled McDade to a trial on his claims; therefore, the trial court's award of summary judgment for the defendants was not proper.

The Texas Supreme Court held that commission agreements are construed like other business contracts, and that an exception in the contract to the right to collect a commission precludes recovery of a commission, even if the circumstances are unusual or "unfair." The court held that the following exception clause in the listing agreement was clear:

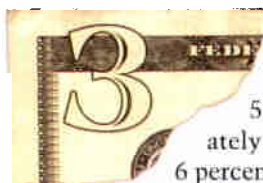
We hereby appoint McDade + Company as our sole broker and grant to McDade the exclusive right to obtain a lease or purchase of premises on our behalf, with the exception of Friendswood Development

Company or other Exxon affiliates which are excluded from the terms of this contract.

The Supreme Court overruled the court of appeals, which prevented McDade from introducing undisputed, outside evidence that Friendswood had never leased space it did not own, and because of that, McDade entered into the contract with the understanding that the exception would apply only to Friendswood leasing its own properties.

### Specific Property Description Required

The Texas Supreme Court requires that a commission agreement must reasonably identify the property involved or it is unenforceable.



In *Texas Builders v. Keller*, a landlord sent solicitation letters to several brokers, including Keller, stating that 58,333 square feet of space was immediately available at 12050 Rojas and offering a 6 percent commission on all leases. The 12050 Rojas location contained 100,000 square feet total.

The same landlord had an additional 112,500 square feet at 12058 Rojas. Keller presented a tenant for the 12050 Rojas address to the landlord. The landlord delayed negotiating with Keller and began negotiating with the tenant directly, resulting in a lease for 16,667 square feet at 12050 Rojas and all of 12058 Rojas.

Keller sued the landlord for fraud and to collect his commission using the solicitation letter as a written commission agreement. Keller won at trial and appeal, both for fraud and breach of contract.

However, the Texas Supreme Court reversed the judgment,

saying the solicitation letter did not satisfy TREL A requirements for a commission agreement because the property description was not specific. According to the court, "a contract providing for the sale or lease of an unidentified portion of a larger, identifiable tract is not sufficient."

The landlord's solicitation letter offered only 58,333 square feet of a total of 100,000 square feet at 12050 Rojas. The tenant leased only 16,667 square feet at that address.

Whether the 16,667 square feet was part of the offer in the solicitation letter was not clear, said the court, so the agreement did not satisfy TREL A.

As to the fraud claim, the court wrote, "Keller cannot circumvent the requirements of the Act by claiming the lost commission as fraud damages." In other words, a broker cannot allege fraud based on the failure to pay a commission if the basis of the claim is an unenforceable commission agreement.

### Broker Must be Clearly Identified

Brokers must be clearly identified in commission agreements.

*In many cases, brokers prove their own worst enemies by failing to follow relatively simple requirements.*



In *Boyert v. Tauber*, a commission agreement stated that the buyer would pay a commission to “outside brokers” but did not name them. The purchase contract mentioned no brokers. Relying on the buyer’s representations that a commission would be paid, Boyert located a suitable property, which the buyer purchased for \$17 million.

When the deal closed, the buyer refused to pay Boyert a commission. Boyert sued, claiming that a letter he had sent was sufficient to serve as a commission agreement under TRELA, and that the doctrine of “partial performance” should preclude the buyer from enforcing any more rigorous legal requirements (such as full compliance with the TRELA requirements).

The Texas Supreme Court held the commission agreement unenforceable, notwithstanding the broker’s performance.

### TRELA Violations May Kill Commissions

A recent court of appeals decision added the obligation to comply with every TRELA requirement relating to representation of the principal to receive a commission. Noncompliance by the broker will defeat a commission claim, whether or not the broker was the procuring cause of a sale or lease or the principal was harmed by the noncompliance.

TRELA provides that TREC may revoke or suspend a broker’s license if it determines that the licensee has failed to specify a definite termination date that is not subject to prior notice in a commission contract (except for contracts to perform property management services). In *Perl v. Patrizi*, Perl held that the broker’s failure to provide a termination date in his commission agreement rendered the agreement unenforceable.

The appeals court ruled that a broker’s noncompliance with any part of TRELA may render a commission agreement unenforceable. Based on the Texas Supreme Court’s treatment of commission agreements in the Boyert and Harkinson cases, the court wrote:

These cases [*Boyert* and *Harkinson*] reflect that the requirements of a contract as set out by the Act [TRELA] are not merely requirements that must be met to retain a Realtor’s® license, but are also substantive directives that must be followed in analyzing the contracts entered by licensed Realtors.® Accordingly, we conclude that we must apply the rule and statute as set out by the Legislature in our analysis of the contract at bar.

### Practical Tips

What does all of this mean for practicing brokers and agents? To ensure that they collect a commission, brokers should comply with all requirements of TRELA, not merely those provisions relating to the form of commission agreements.

Brokers should get a properly signed commission agreement at the outset of the transaction. A good commission agreement form will help brokers avoid “reinventing the wheel” and ensure that all necessary components are included. The appropriate lien language should be included for commercial properties.

The Texas Association of Realtors has a set of forms members can use that are updated regularly by staff attorneys to meet all TRELA requirements. Brokers should consult with legal counsel if there are unusual circumstances or if the commission agreement is heavily negotiated.

Brokers should be careful not to inadvertently sign release-of-commission claims. When a deal breaks down, title companies



often require a signed release document before they will return the earnest money. Those releases typically are signed by all brokers, and include language releasing all claims related to the failed deal, including claims for brokerage commissions. If the deal later revives, the broker who has signed such a release may be out of luck.

In *Fraday v. May*, a court of appeals case, when a deal revived and the parties attempted to exclude the broker from the new transaction, the broker prevailed in his suit for commission because the original contract satisfied TRELA requirements and the subsequent contract was for the same land with the same parties. If the broker had signed a release, the commission would have been unrecoverable.

When brokers find that a commission situation is “heading south,” and no (or an inadequate) written commission agreement exists, they can try to negotiate an agreed-upon fee and put the results of the negotiation in writing signed by the party who will pay the commission. In such situations, brokers are often forced to take what they can get.

Following a few rules will protect well-intentioned brokers from the unfortunate fate of Harkinson, McDade, Keller and Boyert. ❖

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